

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge with regard to whether claimant suffered accidental injury arising out of and in the course of employment and notice should be reversed.

Claimant contends that the Board does not have jurisdiction to hear this matter, alleging the issues of notice and arising out of and in the course of employment were not raised at the April 22, 2003 hearing before the Administrative Law Judge. However, at that hearing, the attorney for respondent stated “. . . so we have, again, raised the compensability issue arising out of the schedule of the employment. Also we'll raise the issue of, finally, notice, and that is the first basis for the motion to terminate.”¹

As the issues were presented to the Administrative Law Judge for his determination, they are properly before the Board for determination at this time.

Claimant alleges accidental injury on October 26, 2000, while working for respondent as a waitress. Claimant testified she was walking into the kitchen to get some horseradish when she slipped, but did not fall, on the slick floor. Claimant testified that Adam Heiman, a former employee of respondent, was a witness to the accident. Mr. Heiman, who worked as a dishwasher and assistant chef for respondent, was working in the kitchen on the alleged date of accident. However, Mr. Heiman denied seeing or hearing claimant suffer any type of fall or near fall in the kitchen. He also testified claimant, at no time, talked to him about any accident she may have suffered on that date. When describing the kitchen, Mr. Heiman stated that it was fairly small and any incident such as described by claimant would have been brought to his attention, as he was only working a few feet from that location.

Additionally, Brett Eakes, respondent's co-owner (who acts as cook at the establishment), denied any such incident occurred on the date alleged by claimant. He testified claimant never told him of any slip or near fall. He also described the kitchen as being a small area and any incident such as described by claimant would have been easily apparent.

Several other witnesses for respondent testified regarding the night of the alleged accident. Teresa Williams, Roberta Marsh and Melody Lolley-Jones, all waitresses with respondent, testified that claimant was having back pain on the night alleged, but that she never advised any of them of an accident occurring in the kitchen. Dorothy Hopkins, the manager and respondent's accountant, testified that when claimant came to work that night, she was already experiencing back pain. Ms. Hopkins testified that this was not a first-time incident, as claimant had on a regular basis suffered various types of aches, pains and complaints while at work. None of the witnesses who testified on respondent's behalf recall claimant ever mentioning any type of work-related accident in the kitchen.

The only persons who testified in this matter on claimant's behalf were Brandy Ruse and Shane Ruse, claimant's daughter and son-in-law. Both testified that claimant came

¹ M.H. Trans. (Apr. 22, 2203) at 6.

home on the night of the alleged accident complaining of back pain and discussing a near slip in the kitchen. However, the Board questions the credibility of Brandy and Shane Ruse, as both denied claimant ever having any prior back problems or complaints. In fact, Brandy Ruse denied that claimant had ever suffered any type of preexisting complaints in her shoulders, arms, upper back, hands, legs or neck. When Ms. Ruse was presented with medical evidence indicating that claimant was having difficulties in all of these areas, including loss of sleep, nervousness, sweating, blurred vision, shingles, chest pains, high blood pressure, rapid heart beat and headaches, along with pain in her hands, legs, neck, shoulders and head, Ms. Ruse's memory suddenly improved. The credibility of Brandy and Shane Ruse is questioned by the Board due to what appears to be selective memory loss regarding claimant's ongoing preexisting physical symptoms.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.² Here, the Board finds that claimant has not proven that she suffered an accidental injury arising out of and in the course of her employment on October 26, 2000. The testimony of the witnesses on site contradicts claimant's allegations. Roberta Marsh, a co-employee of claimant, went so far as to say claimant was playing some kind of game in order to get Michelle Eakes, co-owner of respondent, to perform her waitressing tasks. Ms. Marsh apparently objected to this, lodging a complaint with Mr. Eakes, the co-owner and cook. Additionally, several of respondent's employees discussed the complaints that had been lodged against claimant leading up to the October 26, 2000 date. Claimant had apparently come to work on more than one occasion smelling of alcohol, slurring her words and stumbling as she walked. She had been sent home from work on more than one occasion due to her inability to perform her duties. In considering the totality of the evidence, the Board finds that claimant's testimony and the testimony of her daughter and son-in-law are less credible than the testimony of the witnesses provided by respondent. The Board, therefore, finds claimant has failed to prove that she suffered accidental injury arising out of and in the course of her employment on October 26, 2000.

K.S.A. 44-520 obligates that notice of accident be provided within 10 days of the date of accident. Dorothy Hopkins, the manager and accountant for respondent, testified that it was between one and two months after the October 26 incident when she found out claimant was actually alleging a connection between her back pain and her employment with respondent. That time table would be in violation of K.S.A. 44-520. The Board, therefore, finds claimant failed to provide notice of accident as is required by K.S.A. 44-520.

Wherefore, the Board finds that the Order of the Administrative Law Judge denying respondent's Motion To Terminate Medical Benefits should be reversed as the Board finds

² K.S.A. 44-501 and K.S.A. 44-508(g).

claimant has failed to prove that she suffered accidental injury arising out of and in the course of her employment and that she failed to provide timely notice of accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated May 9, 2003, should be, and is hereby, reversed, as claimant has failed to prove that she suffered accidental injury arising out of and in the course of her employment and further failed to prove that she provided timely notice of accident.

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

c: Steven M. Tilton, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Director